No. 16-15372

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AILEEN RIZO,
Plaintiff-Appellee,

v.

JIM YOVINO, Fresno County Superintendent of Schools, Erroneously Sued Herein as Fresno County Office of Education,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of California
E.D.Cal. No. 1:14-cv-00423-MJS
Michael J. Seng, Magistrate Judge, Presiding

SUPPLEMENTAL BRIEF IN RESPONSE TO COURT'S ORDER OF AUGUST 9, 2019

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I. INTRODUCTION

On August 9, 2019, the Court ordered the parties "to file simultaneous supplemental briefs addressing the Supreme Court's opinion in *Yovino v. Rizo,* 139 S. Ct. 706 (2019), and any other developments since this case was submitted to the en banc court."

II. RELEVANT CASE HISTORY

On December 4, 2015, the District Court denied defendant Jim Yovino's motion for summary judgment, finding that the Fresno County Office of Education's ("County's") policy of paying a new employee a salary equal to that employee's most recent salary plus five percent "is so inherently fraught with the risk - indeed, here, the virtual certainty -- that it will perpetuate a discriminatory wage disparity between men and women that it cannot stand, even if motivated by a legitimate non-discriminatory business purpose." Dkt. 21, pp. 16-17. The District Court's decision was based upon its conclusion that the County's policy that led to the wage disparity on the basis of gender could not be justified by the Equal Pay Act's (29 U.S.C. § 206[d]) exception that allows a disparity when the employer can show that it "results from a factor other than sex" such as the application of a facially neutral policy. *Id.* at 16.

On April 27, 2017, a panel of this Court reversed (*Rizo v. Yovino*, 854 F.3d 1161), finding that Rizo's case was controlled by the Court's decision in *Kouba v. Allstate Insurance Co.*, 691 F.2d 873 (9th. Cir. 1982), holding that "prior salary can be a factor other than sex, provided that the employer shows that prior salary 'effectuate[s] some business policy' and the employer uses prior salary 'reasonably in light of [its] stated purpose as well as its other practices.'" *Id.* at 876-877.

On April 9, 2018, this Court *en banc* overruled *Kouba* and affirmed the district court's decision. *Rizo v. Yovino,* 887 F.3d 453. All eleven judges agreed that the County's bare reliance on Ms. Rizo's prior pay to set her salary could not constitute an affirmative defense under the EPA.

The majority opinion, written by Judge Reinhardt, held "that prior salary alone or in combination with other factors cannot justify a wage differential. To hold otherwise-to allow employers to capitalize on the persistence of the wage gap and perpetuate that gap *ad infinitum*-would be contrary to the text and history of the Equal Pay Act, and would vitiate the very purpose for the Act stands." *Id.* at 456-457. The decision emphasizes that a to be justified, "a factor other

than sex *must* be one that is job related, rather than one that 'effectuates some business policy.'" *Id.* at 468.

Judge McKeown, joined by Judge Murguia, agreed that the majority "correctly decides the only issue squarely before the court." *Id.* at 469. Judge McKeown concluded that prior salary alone is not a defense to unequal pay for equal work. But she would allow employers to attempt to show that an unequal salary that results from the consideration of "valid job-related factors such as education, past performance and training" along with prior salary is "determined on the basis of 'any other factor other than sex.' " *Id.* at 470.

Judge Callahan, joined by Judge Tallman, disagreed with the majority's conclusions "that prior salary inherently reflects gender bias" (*Id.* at 473) and that factors allowable under the fourth EPA exception must be "job related." *Id.* at 474. But Judge Callahan agreed with the majority and with the Eleventh Circuit "that based on the history of pay discrimination and the broad purpose of the Equal Pay Act, prior salary by itself is not inherently a 'factor other than sex.' " *Id.* at 475. As a result she agreed that Rizo's rights were violated when the County based her initial compensation solely on her prior salary. *Id.* at 477.

Finally, Judge Watford concurred in the result, concluding that although an employer should be allowed to attempt to justify a gender pay disparity when present salary is based upon past compensation, the County had failed to do so in this case. *Id.* at 479. Judge Watford also concluded that, "[I]f past pay does reflect sex discrimination, an employer cannot rely on it to justify a pay disparity, whether the employer considers past pay alone or in combination with other factors." *Id.* at 478.

On February 25, 2019, the Supreme Court vacated the judgment of the Court, based solely on its conclusion that Judge Reinhardt's vote could not be counted to create a majority decision of the en banc court because the decision was issued 11 days after his death. *Yovino v. Rizo,* 139 S.Ct. 706, 710 (2019). The Supreme Court remanded the case for further proceedings consistent with its opinion. *Id.* On April 4, 2019, Judge Bea was drawn to replace Judge Reinhardt on the en banc panel.

III. ARGUMENT

A. FURTHER PROCEEDINGS IN THIS COURT

The precise procedural issue posed by this case has apparently not previously been addressed by the Court. However, the rationale of

the decision in *Perez v. City of Roseville,* 926 F.3d 511 (9th. Cir. 2019) provides guidance for future proceedings here. Citing *Carver v. Lehman,* 558 F.3d 869, 878-881 (9th. Cir. 2009), the court in *Perez* concluded that following the death of the original decision's author it was proper for a reconstituted three judge panel to withdraw, reconsider, and replace a prior decision that had not become final with a substantially revised version. 926 F.3d at 525-26.

The same process should apply here. The new en banc court may reconsider and affirm or withdraw the prior decision and replace it with a revised version. The Court may order further briefing or oral argument.

B. RESOLUTION OF THE CASE ON ITS MERITS.

1. All Members of the En Banc Court Supported the Decision in favor of the plaintiff.

All 11 judges supported the judgment in favor of plaintiff Rizo. Plaintiff now urges the Court to adopt the opinion of Judge Reinhardt as its opinion in this case. The thrust of Judge Reinhardt's opinion is (1) prior pay is a reflection of the discriminatory market place that the Equal Pay Act was designed to remedy (*Corning Glass Works v. Brennan,* 417 U.S. 188, 195 [1974]) and should never be utilized as the

basis for setting a new employee's salary[1]; and (2) consistent with the EPA's legislative history, the fourth "catchall" exception, which allows salary disparities resulting from a legitimate "factor other than sex," should be interpreted as applicable only to job related conditions to remain consistent with the other three specific exceptions, that is, they must be measures of work experience, ability, performance, or any other job-related quality. 887 F.3d at 462.

Allowing an employer to consider prior salary along with other factors in setting an employee's initial salary may mitigate but does not eliminate the discriminatory impact of past employment practices. Even if prior salary is valued at just 10 percent or less in an employer's assessment of the various factors to be considered in setting a new employee's compensation, it still brings a discriminatory factor into the equation.

The Supreme Court has emphasized that the purpose of the EPA was to remedy salary inequities based upon historic pay discrepancies. *See Corning,* 417 U.S. at 195. The Equal Pay Act

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[1] Judge Reinhardt's opinion disclaimed any attempt to resolve the application of its general rule "under all circumstances." 887 F.3d at 461. In particular, the majority expressly reserved the question "whether, or under what circumstances, past salary may play a role in the course of an individualized salary negotiation." *Id.*

requires that employers pay women and men the same salary for "equal work on jobs the performance of which requires equal skill, effort, and responsibility." 29 U.S.C. § 206(d)(1).

Pay inequities will not be remedied by simply reducing the impact of historic discrimination. As Judge McKeown recognized in her concurrence, the pay gap between men and women had been reduced from 60 percent in 1963 to 80 percent in 2017. But the purpose of the EPA is to eliminate rather than reduce that disparity.

2. The former majority opinion correctly states the law and should be adopted by the new en banc panel.

The now plurality opinion rightly concluded that an employer cannot pay a female employee less than her male counterparts solely because of her prior salary at a different job with a different employer. Such a policy does not qualify as "a differential based on any other factor other than sex" within the meaning of 29 U.S.C. § 206(d)(1)(iv). The opinion follows straightforwardly from the text, history, and logic of the Equal Pay Act.

(1) As a matter of statutory language, the Act's fourth affirmative defense protects employers only if the pay differential is "based on any other factor other than sex." 29 U.S.C. § 206(d)(1)(iv). The County ignores completely the critical phrase "any *other* factor"

in its construction of the statute. (emphasis added). The Oxford English Dictionary provides a definition of the phrase "any other" that shows that it refers to a thing "specified or understood contextually." (3d ed. 2004) Congress's use of this phrase therefore highlights the importance of where Section 206(d)(1)(iv) is found - namely, (a) in a list of (b) affirmative defenses.

(2) The canons of statutory construction on which the opinion relied (887 F.3d at 461-62), explain how to treat a general term that appears after a list of specific provisions. *Noscituur a sociis* stands for the principle that words are to be understood by the company they keep. *Ejusdem generis* applies this principle to general provisions following specific lists: "Where general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Yates v. United States*, 135 S. Ct. 1074, 1086 (2015) (plurality opinion) (alteration in original) (quoting *Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003)). Thus, in *Yates*, the plurality defined the statutory term "any tangible object" to mean

"objects used to record or preserve information" because it followed the specifically enumerated terms "record" and "document." *Id.*

Here, Judge Reinhardt's opinion correctly relied on these canons to explain that the fourth affirmative defense encompasses only factors related to the job an employee currently performs.[2] And the Court explained in detail why prior salary, standing alone, is not one of those factors. *Id.* at 465-67. By contrast, the County, in ignoring these canons, would allow any factor, no matter how unrelated to an employee's qualifications or experience, to defeat the Equal Pay Act's fundamental requirement that equal work merits equal pay.

(3) Moreover, Section 206(d)(1)(iv) involves an affirmative defense. Words in a statute must be construed "with a view to their place in the overall statutory scheme." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (quoting *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012)). In this statute, the phrase "any other factor" operates to identify a circumstance under which an employer can justify an otherwise illegal pay disparity. *See Corning*. When "a general statement of policy is qualified by an exception," the Supreme Court

[2] Judges McKeown and Murguia (*Id.* at 472) agree with the plurality opinion that valid factors other than sex must be job related.

"read[s] the exception narrowly in order to preserve the primary operation of the provision." *Comm'r v. Clark*, 489 U.S. 726, 739 (1989). This rule is especially strong in the context of the Fair Labor Standards Act: Exceptions are "narrowly construed against the employers seeking to assert them." *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 232 n.7 (2014) (citing *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)).[3]

Judge Reinhardt's opinion was therefore correct to construe the fourth affirmative defense as limited to "legitimate, job-related factors." The first three affirmative defenses relate to an employee's current job. Seniority rewards the "heightened value" that employees accrue through "personal work experiences" over time. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 535 (1983). Merit rewards skills. And quality and quantity of production reward output.

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[3] The Court should not rely on constructions of the phrase "any other" that appear outside the Fair Labor Standards Act. For example, in *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 221 (2008), the Supreme Court interpreted the meaning of "any other" in the phrase "any other law enforcement officer" expansively. But that case involved the Federal Tort Claims Act, 28 U.S.C. § 2680(h). The Supreme Court has long held that, because the FTCA waives the government's sovereign immunity, any court "must construe any such waiver narrowly." *West v. Gibson*, 527 U.S. 212, 222 (1999). Accordingly, "any other" in the law enforcement proviso must be construed expansively in order to restrict the government's waiver.

Id. at 461. In this way, the three specific affirmative defenses enable an employer to pay more to an employee who has more to offer. The fourth affirmative defense should therefore also be limited to job-related factors, and the County has never explained why the prior pay of its employees indicates anything about their ability to perform the jobs for which it hired them.

(4) Additionally, the County's reading would render the enumerated affirmative defenses surplusage. The Supreme Court has warned against interpretations that "render superfluous" another part of the statutory text. *Marx v. General Revenue Corp.*, 568 U.S. 371, 386 (2013); *see also* Scalia & Garner, *Reading Law* 176. In the context of a list containing both specific and general terms, the Supreme Court "will not read a 'catchall' provision" to create general terms "that would include those specifically enumerated." *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011). The County is undeterred by this longstanding rule. Its construction of Section 206(d)(1)(iv) easily includes the three specifically enumerated defenses within the catchall because none of them—merit, seniority, and quantity or quality of production—involves considering sex as such. In the County's reading, the specifically enumerated exceptions

are unnecessary. But rather than passing a statute with a single exception, Congress enacted one with four. The opinion was right to give Congress' choice meaning.

(5) The County cannot escape the meaning of the text by selective resort of legislative history. It quotes language from a House Committee Report for the proposition that courts should construe Section 206(d)(1)(iv) broadly. But it ignores the Report's very next sentence, which provides specific examples of practices that would fall within that provision. Every example the Report provides represents a job-related factor that would easily satisfy Judge Reinhardt's test. House Comm. on Equal Pay Act of 1963, H. R. Rep. No. 88-309, at 3 (1963).[4]

Far from serving the purposes of the Equal Pay Act, the County's reading would have rendered the Act a dead letter on the day it was passed. In 1963, women's wages averaged less than two thirds of men's. 109 Cong. Rec. 9199 (statement of Rep. Green). If prior pay could have served to justify a wage differential, the Act

[4] The list shows that Section 206(d)(1)(iv) protects employers only when they have "valid reasons" to pay employees of one gender more than employees of another for equal work.

would have simply enshrined the persistent "wage differentials" it was designed to "correct." P.L. 88-38 § 2(a).[5]

(6) Contrary to the County's argument, prior pay is not a job-related factor. The County is simply wrong to claim that prior pay is a good stand-in for a worker's "qualification[s], experience, and performance"—all the more so when a worker is moving into a different job. For example, under the County's view, a law firm could pay a male first-year associate, whose pre-law school job was at a consulting firm, $190,000 per year while paying a female first-year associate, who worked her way through law school as a waitress, the minimum wage. This cannot be the law. Under the Equal Pay Act, deviations from equal pay require a tangible relationship to differences in what the plaintiff and opposite sex comparators are doing *now*.

Ms. Rizo's situation offers a powerful rebuttal to the claim that prior salary alone can legitimately explain why a female worker is being paid less than her male colleagues. Ms. Rizo had better qualifications and more experience than her male comparators.

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[5] The gap persists today. On average, "the median weekly earnings of full-time workers in the 'education, training, and library occupations' are $1,140 for men and $897 for women." Amended Order Denying Defendant's Motion for Summary Judgment n.6.

Nonetheless, the County started her at a salary over $10,000 lower than the salary it gave them.

(7) The County has candidly conceded that it seeks to transform the Equal Pay Act into a statute that prohibits only discrimination that rests explicitly on sex or where an ostensibly neutral criterion is pretextual—that is, a statute "focused on discriminatory intent."

But the County has offered no argument as to why the Supreme Court's longstanding construction of the Equal Pay Act as a statute that does not require proof of "intentional discrimination" should be set aside. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 640 (2007); *see Corning*, 417 U.S. at 205.

This Court was therefore correct in unanimously rejecting the County's claim that it could pay Ms. Rizo $10,000 less per year for performing exactly the same job as her male colleagues solely on the basis of her prior salary in a different job for a different employer hundreds of miles away.

IV. CONCLUSION

For the reasons set forth above, plaintiff-appellee Aileen Rizo urges this Court to adopt the previous majority decision as its opinion in this case.

Dated: September 13, 2019

SIEGEL, YEE, BRUNNER & MEHTA

By: *s/Dan Siegel*
Dan Siegel

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AILEEN RIZO

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 13, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Elizabeth Johnson